In the

Supreme Court of the United States

OCTOBER TERM, 1948

No. 685

PETE MAHONEY,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

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PETE MAHONEY,
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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Pete Mahoney, by his attorney, William G. Fitzpatrick, respectfully prays for the issuance of a Writ of Certiorari to review a final judgment of the Michigan Supreme Court, affirming petitioner's conviction (on December 8th, 1945) and his sentence thereupon (on July 8th, 1946) in the Circuit Court for the County of Oakland, State of Michigan.

(Unless otherwise clearly shown by context, numbers in parentheses preceded by "R" refer to pages of the printed record.)

SUMMARY STATEMENT OF THE CASE

Petitioner, together with Harry Fleisher, Mike Selik, Sammy Chivas, and William Davidson, was charged in an information filed August 30, 1945 (R. 1194) with armed robbery of one James Dades[1] at the Aristocrat Club in the City of Pontiac, County of Oakland, Michigan, on December 2, 1944, between three and four a. m.

This prosecution grew out of a complaint and warrant issued June 11, 1945, by a so-called "one man grand jury" sitting in Oakland County, Michigan. After an examination held July 21 and 22, 1945, petitioner and all co-defendants were bound over for trial.

On October 20, 1945, petitioner filed a motion for continuance (R. 4, 1023-1026), and for separate trial (R. 4, 1027-1030). Both motions were denied (R. 4, 29, 30).

The trial of the case commenced October 23, 1945 (R. 5, 109). On December 7, 1945, petitioner and all co-defendants were found guilty as charged by verdict of the jury (R. 55) and on December 8, petitioner was sentenced to prison for a term from 25 to 50 years (R. 57). Petitioner seasonably filed a motion for a new trial (R. 1067) which was denied (R. 1088).

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[1] James Dades was the proprietor of the Aristocrat Club, which was patronized principally by members of Greek extraction. The club rooms were utilized for gambling purposes. Dades and Petitioner Mahoney were old friends (R. 159), both were of Greek ancestry. Petitioner's full and correct name is Peter Apostolopoulos. He has not used his correct name for more than ten years because pronunciation thereof was so difficult (R. 534).

THE FACTS[2]

The case against petitioner stands or falls upon the testimony of two state's witnesses, Abramowitz and Luks. Both of these men, having been granted immunity against prosecution for the robbery (R. 450, 206), freely admitted it.

Abramowitz was 37 years of age. In 1925 he was convicted of a felony at Detroit, Michigan (automobile theft) and sentenced to two years probation (R. 346). In 1928 he was convicted of a second felony at Detroit (breaking and entering) and sentenced to prison for a term of five to fifteen years (R. 346). He was convicted of a third felony in 1936 (robbery armed) and sent to prison for ten to twenty years (R. 346). He was on parole at the time of the Pontiac robbery. Abramowitz had also confessed to participation in a 1945 conspiracy to murder (R. 233). He had received immunity on this charge.

State witness Luks was 29 years old, and also had been convicted of three felonies. The first was in 1933 (larceny from a building) and he was sentenced to two years probation, upon violation whereof he was sent to prison for one to four years (R. 167). The second felony conviction was in 1937 (larceny) upon which he was sentenced to prison for two-and-a-half to five years (R. 168). His third felony conviction (carrying a concealed weapon)

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[2] Recognizing the restricted scope of this Court's supervision (under the Fourteenth Amendment) of the State's judicial process and that the rules require that petition for writ of certiorari be concise, nevertheless, we submit that it is necessary to summarize for the Court all significant testimony in order that we may properly assist this Court in reviewing the record, a task which must be borne by the Court where, as here, there is claim of denial of due process. (Cf. *Avery v. Alabama*, 308 U. S. 444, 447).

was in 1940, and he was sentenced to prison for from five to ten years. He was on parole at the time of the Pontiac robbery. He likewise admitted complicity in a conspiracy to murder in 1945, and had been granted immunity on this charge (R. 207). He was familiar with the Michigan Habitual Criminal Law, and knew that the penalty thereunder for a fourth felony conviction was life imprisonment (R. 225).

STATE'S THEORY OF THE CASE

It was the theory of the State that petitioner and co-defendants Fleisher and Selik solicited and obtained the consent of State's witnesses Luks and Abramowitz and co-defendant Davidson to actually perpetrate the robbery, and that of defendant Chivas to obtain admission into the club to be robbed for the robbers (R. 347, 349-359); that in pursuance whereof all the defendants met with Luks and Abramowitz at petitioner's coffee house in downtown Detroit about 1:00 a. m., December 2, 1944 (R. 354) where they discussed the projected robbery and agreed that the fruits of same would be divided between Luks, Abramowitz, Davidson and Chivas, and that Fleisher, Selik and Mahoney would receive nothing (R. 174). Just what Fleisher, Selik and Mahoney were to gain from the robbery is not apparent from the record, but it probably can be inferred that the prosecution's claim is that these three expected that, as a result of the robbery, Dades would be without funds and thereby they would be enabled to take over his gambling establishment (R. 351). Luks testified he met Mahoney only once (R. 168); that he came to Detroit December 1, 1944, after talking to Selik by long-distance telephone (R. 189); that during this conversation he made no agreement to meet Selik at

any certain place (R. 189) and that Mahoney's name was not mentioned (R. 194) and that, whereas, on previous occasions he had met Selik only at a certain saloon in the city of Detroit, nevertheless, he went to Mahoney's coffee house on the night in question only "because it was closer to the railroad station" (R. 189-190, 226).

It is admitted that in October, 1944, all of the defendants, excepting Davidson, visited Dades at Pontiac to obtain funds to aid in the prosecution of an appeal for Fleisher's brother Louis, who had been convicted of a crime in another state (R. 153-155, 714). Even though Dades was short of funds (he had been ill for some time and had suffered gambling losses), he offered to contribute $500.00 cash and a valuable diamond ring. His offer was refused (R. 563-566). Dades and the defendants named parted the best of friends (R. 155) and from that day henceforth, Dades testified that he heard nothing from any of the defendants, and that after the robbery he operated his gambling establishment unmolested by any of the defendants (R. 159).[3]

It is the further claim of the State that after the meeting in petitioner's coffee house, all the defendants drove to a saloon in Detroit in petitioner's automobile where they obtained the use of an automobile owned by one Martin Eisner (R. 358).

State's witness Eisner testified that on December 1, 1944, he loaned his automobile to one Hymen Niskar with the understanding that Niskar would return it to the vicinity of Eisner's residence the same evening (R. 320);

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[3] Dades testified that among friends of Greek origin, it was the custom whenever necessary for them to help each other financially (R. 160). He testified of having previously loaned $1,500.00 to Mahoney indirectly and that he was repaid by Mahoney (R. 160).

that the following morning, he found the car at the place where Niskar agreed to leave it, but that upon driving downtown, his attention was called to substantial blood-stains on the rear floor carpeting of his car (R. 322, 323); and that the amount of blood was such as to cause a lawyer riding in the automobile to inquire of Eisner, "Who had the miscarriage?" (R. 339); that Eisner went to Selik's apartment on the afternoon of December 2, 1944, and asked Niskar how the blood came to be upon the floor rugs of his car, but received no satisfactory explanation from Niskar (R. 326).

The State likewise claimed that the defendants Davidson, Selik, and Luks and Abramowitz, were driven to Pontiac in Eisner's car by Fleisher (R. 358); that Petitioner drove his car, an Oldsmobile, to Pontiac, and that defendant Chivas rode with him; that Mahoney took three revolvers with him in his car on this trip (R. 179); that both cars arrived in the vicinity of Dades' place at Pontiac within a few minutes of each other (R. 178); that Chivas went into Dade's establishment, came back to Eisner's car and informed the occupants thereof that only a few persons were in the establishment and that it did not look like a good haul (R. 178). The State claims that thereupon Chivas was sent back with the understanding that he was to admit the holdup men within four or five minutes (R. 179); that thereupon, Luks, Abramowitz and Davidson each obtained a pistol from Mahoney's car, went upstairs to Dades' establishment and were refused admittance (R. 180); later that upon reaching the doorway of the gambling establishment, Abramowitz smashed the glass door, reached in, unlatched the door, and gained admission for his associate Davidson (R. 362) who, together with Luks, robbed the patrons of the club; that in opening the door, Abramowitz severely cut his wrist

and arm, and it bled so profusely that he ran downstairs to Eisner's car, which the State claimed was then occupied by Fleisher and Selik, got in the back seat, remained only a few seconds and then went to Mahoney's car (R. 363); and Mahoney drove him to a hospital at Detroit, Michigan.[4]

The State further claims that after the robbery, Fleisher and Selik drove Davidson and Luks from Pontiac to Detroit, where Fleisher left the others; that Selik, Davidson and Luks went to a restaurant on Dexter Boulevard in Detroit, where from the proceeds of the robbery Luks gave Davidson $150.00 as his share (R. 185). The stories of Luks and Abramowitz were vague and conflicting as to the exact proceeds of the robbery. At one point it was claimed that $800.00 was taken, later, that $1,600.00 was taken (R. 184, 258, 281). Luks testified that after leaving the Dexter Boulevard restaurant, he and Selik went to Greenfield's Restaurant on Woodward Avenue in downtown Detroit, where they were joined by Chivas; that Selik phoned Mahoney and that shortly thereafter, Mahoney joined the party at Greenfield's (R. 184-185); that he gave the defendant Chivas $150.00 at Greenfield's Restaurant (R. 186).

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[4] Abramowitz testified that Mahoney's car was a *two-door Oldsmobile* (R. 401); that while bleeding freely, he rode some twenty-five miles to Detroit in Mahoney's car, and that during this ride the blood from his wounds ran over and upon the seats and floor of the car in which he was riding (R. 406). State Police Lieutenant Morse, who questioned Petitioner in April following his arrest, was advised by petitioner that he owned a *four-door* Oldsmobile sedan (R. 562). The State adduced no proof whatsoever that any test for blood had ever even been attempted on the upholstering or floor coverings of Mahoney's car after it was located.

DEFENSE THEORY OF THE CASE

Petitioner Mahoney, who has consistently, from the moment of his arrest, denied any knowledge of or participation in the Pontiac robbery, took the stand in his own behalf and testified fully and frankly, both on direct examination (R. 534-537, 550-572, 576, 577, 616) and upon cross-examination (R. 577-615). Co-defendants Fleisher and Selik likewise took the stand and respectively denied any knowledge of or particuation in the robbery at Pontiac (R. 712-717, 771-782).

Petitioner testified that he emigrated from Greece in 1921, and that he had been a professional gambler at the time of his arrest and for a number of years prior thereto (R. 534, 566, 588); that he had known co-defendant Fleisher very well for about three years (R. 555), co-defendants Selik and Chivas for many years (R. 555-556), Luks and Abramowitz for one year (R. 556, 557), and co-defendant Davidson since 1942 (R. 613); that he first heard about the Pontiac robbery about a week after his arrest on April 20, 1945 (R. 560); that as a favor to Selik, he went to Harper Hospital, Detroit, with Selik one morning in December 1944 about 6:00 a.m., where he and Selik took Abramowitz from the hospital, and that this was after he had received a phone call from Selik asking him to get a room for Abramowitz at his (petitioner's) hotel (R. 558); that upon leaving the hospital the three went to a restaurant, and that shortly thereafter petitioner returned to his hotel alone (R. 559, 560); that upon the night preceding the morning that he went to Harper Hospital, he has been at his place of business in downtown Detroit until about 2:00 a. m. (R. 560, 561), that he thereafter went to a nearby restaurant which he

left after 3:00 a. m. for his hotel, where he retired between 4:00 and 5:00 a. m. (R. 561); that he had not been in any saloon after he left his place of business and prior to the time when he took Abramowitz out of the hospital; that he owned a maroon-colored *four-door 1941 Oldsmobile Sedan* at the time of the trial, and prior to the time of the Pontiac robbery; that the upholstery and floor rugs in his car had never been changed at any time either prior or subsequent to the Pontiac robbery (R. 563); that he had been convicted as a gambler upon several occasions (R. 569), and in 1933, for possession of an unregistered gun in a gambling establishment he was then operating (R. 570).

Selik testified that on December 2, 1944, at about 6:00 a. m., while he was in bed at his home, he received a phone call from Luks, who told him that he needed help (R. 775); that thereupon Selik met Luks at Greenfield's Restaurant in Detroit, where Luks advised him that Abramowitz had been a victim of an attempted robbery, and that while resisting his assailants, Abramowitz had been cut, and that Abramowitz wanted a room in a hotel, where he could stay after he left the hospital; that thereupon Selik phoned Mahoney whom he knew to be a permanent resident of the Strathmore Hotel, and requested Petitioner to get a room there for Abramowitz, and that upon Mahoney asking why, Selik asked Mahoney to join him immediately at Greenfield's Restaurant, where he would inform him of the entire transaction (R. 775-777); that Mahoney, pursuant to Selik's request, secured a room at the Strathmore Hotel for Abramowitz and then joined Selik at Greenfield's from where they went to Harper Hospital in a taxicab and effected Abramowitz's release (R. 777, 778, 366); that Abramowitz was in a weakened condition, that he was taken to Greenfield's

where he drank some milk and where it was decided that he was so weakened by loss of blood that he should not be permitted to remain alone in a hotel room (R. 778); that thereupon Selik agreed to take Abramowitz to his own apartment to be given care by Mrs. Selik (R. 780); that Abramowitz was on parole at this time, and that, as Selik testified and Abramowitz admitted (R. 408), a few years previous, Selik, while on parole from Michigan, had been hurt in an automobile accident near Chicago and at that time Abramowitz took care of Selik in his apartment in Chicago (R. 768).

The defendant Fleisher, testifying in his own behalf, absolutely denied knowledge of or participation in the Pontiac robbery (R. 713).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioner contends that his trial by the State of Michigan, considered in its totality, was essentially unfair and that this (together with the affirmance of his conviction and sentence by the Michigan Supreme Court) resulted in a denial of the due process of law guaranteed to him by the Fourteenth Amendment, requiring this Court to grant certiorari.

This Court recognizes the proposition that procedural due process of law means merely an essentially fair trial. *Adamson v. California,* 332 U. S. 46, 53, 57; *Moore v. Dempsey,* 261 U. S. 86, 91, and that "As applied to a criminal trial denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice," *Lisenba v. Cal.,* 314 U. S. 219.

The due process clause of the Fourteenth Amendment precludes: a trial dominated by a mob, *Moore v. Dempsey, supra;* convictions secured by confessions obtained by "third degree" methods, *Brown v. Miss.*, 297 U. S. 278, 286; *Chambers v. Florida*, 309 U. S. 227, 235; *Ashcraft v. Tenn.*, 322 U. S. 143, 155, 327 U. S. 274; *Malinski v. New York*, 324 U. S. 401; and convictions obtained through the use of testimony known by the prosecuting authorities to be perjured. *Mooney v. Holohan*, 294 U. S. 103; *Hysler v. Fla.*, 315 U. S. 411, 413. The requirements of due process likewise strike down a judgment based on a plea of guilty induced by deception of state officers, *Smith v. O'Grady*, 312 U. S. 329, 334; cf. *Walker v. Johnston*, 312 U. S. 275, 286; or reached in proceedings wherein counsel was wrongfully denied or withheld, *Powell v. Ala.*, 287 U. S. 45; *Ex Parte Hawk*, 321 U. S. 114; *Williams v. Kaiser*, 323 U. S. 471; or based upon an irrational presumption, cf. *Tot v. U. S.*, 319 U. S. 463; or reached after arbitrary curtailment of the trial, *Thomas v. District of Columbia*, 90 F. (2d) 424 (App. D. C.). Furthermore this court has held that "due process" demands observance of certain universally recognized rules of evidence. *Tot v. U. S., supra.* All this is true because these things are essentially unfair. cf. *Palko v. Conn.*, 302 U. S. 319.

Whereas the early decisions of this court, after the adoption of the Fourteenth Amendment, restricted its operation to relatively narrow limits, nevertheless in more recent years this court has so enlarged the scope and effect of the Fourteenth Amendment as to include many, if not all, of the specific rights guaranteed the individual by the so-called "Bill of Rights" Amendments. The fundamental rights now held to be protected by the Fourteenth Amendment are those "of such a nature that they are included in the conception of due process of law". *Twinning v. N.*

J., 211 U. S. 78: because they are "of the very essence of a scheme of ordered liberty," *Palko v. Conn., supra.*

Further and by way of illustration of its expanding scope this court has recently held that certain rights guaranteed by operation of the First Amendment have now been included within the protection afforded by the Fourteenth Amendment against action by state authorities; *Everson v. Board of Education,* 330 U. S. 1; *Bridges v. Cal.,* 314 U. S. 252.

Likewise this Court has recognized the necessity of judicial review imposed on it by the Fourteenth Amendment's guarantee of due process, to consider, "upon the whole course of the proceedings" and trial, whether such proceedings "offend those canons of decency and fairness" which express our notions of justice toward those charged with any crime whatsoever, even those charged with the most heinous offenses. *Adamson v. Cal., supra.*

Furthermore, we contend that State action inhibited by the due process clause of the Fourteenth Amendment is neither limited by nor necessarily inclusive of all the specific provisions of the so-called Bill of Rights Amendments because due process, within the purview of the Fourteenth Amendment, is of an elastic, quick nature, expanding or contracting in manner and to the extent required to insure a fair trial to every individual subjected to criminal prosecution by any one of the several states. "The amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the Federal Government *nor is it confined to them.*" (Emphasis added.) *Adamson v. Cal., supra.*

This being so, then it must follow that the many procedural improprieties incident to the instant prosecution

of Petitioner by Michigan, not heretofore specifically designated by this court as violative of the due process clause of the Fourteenth Amendment could be so essentially unfair as to require them to be catalogued by this court as being violative thereof.

We respectfully submit that in the case at bar, in view of a factual situation raising very grave doubt of guilt, Michigan has accorded petitioner judicial process which, considered in its totality, was so essentially unfair as to violate the due process clause of the Fourteenth Amendment.

QUESTIONS PRESENTED

Whether the due process of law guaranteed by the Fourteenth Amendment is denied a defendant (one of five co-defendants) charged with armed robbery where:

(1) the trial court, sustaining an improper objection to a proper question put to a principal state's witness by defense counsel on cross examination, thereby unduly curtailed, if it did not absolutely deny, proper cross examination on a matter of basic importance;

(2) during the progress of the trial the court, in chambers and not within the knowledge or presence of the defendant or his counsel, interrogated a member of the jury concerning a chance, out of court, meeting during the progress of the trial between the defendant and the particular juror privately interrogated by the court[5];

(3) after the jury began its deliberations, it not appearing to be deadlocked, the trial court gave it an unsolicited

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[5] The transcript of the record of this interrogation (R. 876-882) is set forth herein commencing at pp. 49-54 of Appendix A.

supplemental charge[6] urging agreement on a verdict and within a few minutes thereafter the jury returned a verdict of guilty; it appearing thereafter from the affidavit[7] of at least one member of the said jury, that affiant construed said unsolicited charge of the court as a direction from the trial court that "* * * the jurors of the minority opinion should agree with the majority, regardless of their own reasoning or opinion * * *";

(4) in the presence of the jury, the prosecuting attorney (not provoked by defendant or his counsel) made a statement necessarily calculated to draw the jury's attention to the alleged guilty involvement of the defendant in an entirely separate, distinct and widely publicized murder conspiracy case, the trial of which had been held immediately prior to the trial of the case at bar;

(5) the prosecuting attorney, in the presence of the jury, made highly improper statements whereby, in effect, he "testified" on a material issue by way of circumventing the rule excluding hearsay testimony and the trial court refused to instruct the jury to disregard said improper statements;

(6) the cumulative effect of many improprieties by the prosecution and/or trial court resulted in an unfair trial.

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[6] This unsolicited charge to the jury (R. 1021-1023) is set forth at pp. 55, 56, Appendix B.

[7] This affidavit (R. 1085-1087) is set forth as Appendix C to the annexed brief (pp. 57-59).

JURISDICTION

The order of the Michigan Supreme Court denying petitioner's appeal from his said conviction and sentence was entered October 4, 1948 (R. 1211) and its order denying rehearing was entered November 12, 1948 (R. 1212). The order of a Justice of this Court extending to and including March 31, 1949 the time within which to petition for certiorari was entered February 2, 1949 (R. 1214).

Jurisdiction of this Court is invoked under Section 1257 of Title 28 U. S. C., as amended and revised; the pertinent provisions of which read:

> "Final judgments • • • rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> 1. • • •
> 2. • • •
> 3. by writ of certiorari • • • where any • • • right, privilege is specially set up or claimed under the Constitution, • • • of • • •, the United States."

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides in part, "• • • nor shall any state deprive any person of life, liberty or property, without due process of law; • • •"

PRAYER

Wherefore, petitioner by his attorney, respectfully prays that this petition for a writ of certiorari to the Supreme Court of the State of Michigan be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

SUBJECT INDEX AND TABLE OF CASES AND STATUTES CITED

(See "Sub-index" prefacing annexed petition for writ of certiorari)

II.

OPINIONS BELOW[1]

The opinion of the Michigan Supreme Court affirming petitioner's conviction and sentence (R. 1201-1211) is reported commencing at p. 473 of Vol. 322 Michigan Reports. The order of the Michigan Supreme Court denying petitioner a rehearing (R. 1212) is not reported.

III.

JURISDICTION

(See p. 15 of annexed petition for writ of certiorari)

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[1] The Michigan Supreme Court refers to its opinion in the case of *People v. Chivas*, 322 Mich. 384 in disposing of petitioner's claim advanced herein commencing at p. 29 of this brief. Chivas was tried and convicted together with petitioner. He took a separate appeal to the Michigan Supreme Court and his conviction and sentence were likewise affirmed.

IV.

STATEMENT OF THE CASE

A summary statement of the case is set forth in the annexed petition for writ of certiorari, commencing at p. 2 thereof, and the same is hereby, by reference, incorporated in and made a part of this brief.

V.

QUESTIONS PRESENTED

The questions herein in this brief discussed and argued are set forth at pp. 13 and 14 of the annexed petition for writ of certiorari and the same are hereby, by reference, incorporated herein and made a part of this brief.

VI.

CONSTITUTIONAL PROVISION INVOLVED

(See p. 15 of annexed petition for writ of certiorari)

VII.

ARGUMENT

QUESTION No. 1

SUMMARY OF ARGUMENT

Curtailment of petitioner's cross-examination of a principal state's witness resultant from prejudicial observations by the trial court sustaining an improper objection by the special prosecutor was so essentially unfair as to deprive the defendant of the protection of the due process clause of the Fourteenth Amendment.

RELEVANT FACTS

During cross-examination of state's witness Luks by counsel for this defendant, the following occurred (R. 226-227):

> "Q. I believe you told Mr. Kennedy this morning that the reason you went there was because you thought it was the nearest place where you could contact Mike and the rest of the fellows?
>
> "Mr. Sigler: Now, if the Court please, I submit that is improper. *It is so trivial it is silly.*
>
> "Mr. Bond: I object to the last remark.
>
> "The Court: *Of course, you are asking about a very minor detail and a very slight irregularity.*
>
> "Mr. Bond: I was predicating another question on this particular one.
>
> "The Court: What I am getting at, *you are dealing with things that are very unimportant to find some deviation that probably is very unimportant.*"

Defense counsel attempted no further cross-examination of state's witness Luks along this line because of the court's ruling as set forth above.

Prior to this Luks had testified that Selik telephoned him at Lansing, Michigan, and asked him to come to Detroit (R. 170) but that Selik had not told him where to meet him (R. 189); that Mahoney's name or place of business was not mentioned (R. 194); that although he had met Mahoney only once previously and could not remember where (R. 168) and in spite of the fact that always previously he had met Selik at a saloon miles distant from petitioner's coffee house, he nevertheless went from the railroad depot (R. 171) straight to petitioner's coffee house (R. 171, 190). The record is barren of any showing that state's witness Luks had ever been at petitioner's coffee house prior to the night of December 1.

LAW AND ARGUMENT

Petitioner here contends that the court's characterization of this line of cross-examination as "• • • *very unimportant,*" precluded cross-examination on a vital matter.

The use of the words "trivial and silly" by the prosecutor, presumably in making an objection, was improper and the trial court not only should have sustained counsel's objection to the special prosecutor's remarks but also should have permitted counsel to proceed with this line of cross-examination. Instead the court sustained the prosecutor's objection thereby forcing counsel to abandon his cross-examination aimed at Luks' highly improbable story on prior direct and cross by other counsel concerning his reasons for going to petitioner's coffee house on the night in question, rather than to the bar where he had always

previously met Selik. This line of cross-examination might well have utterly destroyed Luks' credibility. Had this been accomplished, the prosecution's case necessarily fell. Certainly cross-examination on this important matter should not have been characterized as "*very unimportant.*"

Searching cross-examination of state's witness Luks at this very point well might have exposed some of the deep mystery about this case (and particularly about the stories of the two principal state's witnesses) that the student of this record cannot but sense.

A full cross-examination of a witness upon the subject of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called and a denial of this right is a prejudicial and fatal error. *Alford v. U. S.*, 282 U. S. 687.

While it is true that the matter of the ultimate extent of cross-examination rests in the sound discretion of the trial court, *Storm v. U. S.*, 94 U. S. 76; *Blitz v. U. S.*, 153 U. S. 308; *Glasser v. U. S.*, 315 U. S. 60; nevertheless the rule provides that the court's discretionary power to limit cross-examination may not be exercised until *after* the right has been *substantially and fairly exercised.*

Because petitioner was thus cut off at the very beginning of an entirely proper line of cross-examination, the discretionary power of the trial court to limit cross-examination was prematurely exercised and this constituted "prejudicial and fatal error." *Alford v. U. S., supra.*

It is universally recognized that the trial court must exercise extreme caution in the matter of comments made in the hearing of the jury incident to promulgation of rulings and otherwise.

The harm done when the trial judge departed from that attitude of disinterestedness which is the foundation of a fair and impartial trial was not diminished because he so acted through inadvertence and was not intentionally unfair. *Williams v. U. S.*, 93 F. 2nd 685.

This court has most recently restated the fundamental law of the land concerning the unquestioned right of a defendant ... a criminal case to full, free and uninhibited cross-examination of state's witnesses in *Alford v. U. S., supra.*

In the Alford case, this Court reversed a conviction because the trial court (sustaining an appropriately couched if legally improper objection to a question put to an important state's witness on cross-examination) precluded defense counsel from exploring a line of cross-examination calculated to demonstrate the bias and/or other motive (or motives) that *might* have impelled the state's witness to testify as he had on direct. "The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error" (Alford decision p. 694).

The factual parallel between the Alford case and the case at bar is strikingly similar in so far as relates to the matter of denial of cross-examination. In this respect the two cases may fairly be said to be on all fours.

The necessary consequence, in our case, of the characterization by the trial court of defense counsel's line of cross-examination as "very unimportant" was certainly to cut off "in limine" all cross-examination of state's witness Luks bearing on the vital matters of his credibility, motives, and possible bias.

If, as the Alford case holds, "*it is the essence of a fair trial* that reasonable latitude be given the cross-examiner"

and that, "prejudice ensues from a denial of the opportunity to * * * put the weight of the (state's witness') testimony and his credibility to a test, without which the jury cannot fairly appraise them" (p. 692), then the cutting off of petitioner's cross-examination of state's witness Luks was necessarily so flagrant a violation of the rights guaranteed petitioner by the due process clause of the Fourteenth Amendment as to demand that this court issue certiorari because:

(a) Due process of law means merely *an essentially fair trial. Adamson v. Cal.*, 332 U. S. 46, 53, 57; *Moore v. Dempsey*, 261 U. S. 86, 91;

(b) As applied to a criminal trial, denial of due process is the (state's) failure to observe *that fundamental fairness essential to the very concept of justice. Lisenba v. Cal.*, 314 U. S. 219;

(c) Due process demands observance of certain *universally recognized rules of evidence. Tot v. U. S.*, 319 U. S. 463;

(d) The *fundamental rights* now held to be protected by the Fourteenth Amendment are those of such a nature that they are included in the conception of due process of law. *Twinning v. N. J.*, 211 U. S. 78;

(e) In these and other situations, immunities that are valid against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and, thus through the Fourteenth Amendment become valid as against the states. *Palko v. Conn.*, 302 U. S. 319, 325.

While we recognize that the Alford case involved the review by this court of a federal prosecution, nevertheless if

the right to reasonable latitude on cross-examination "*is the essence of a fair trial,*" then it necessarily follows that the Alford decision does, by force of logic and reason, operate to denounce in the case at bar the trial court's unreasonable limitation of petitioner's cross-examination of state's witness Luks as such a violation of the due process clause of the Fourteenth Amendment as would entitle petitioner to certiorari.

> "To suppose that 'due process of law' means one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." *Malinski v. N. Y.*, 324 U. S. 415.

QUESTION No. 2

SUMMARY OF ARGUMENT

Two privately conducted interrogations of a juror by the trial court irreparably prejudiced petitioner and resulted in an essentially unfair trial, violative of rights guaranteed him by the due process clause of the Fourteenth Amendment.

RELEVANT FACTS

Unbeknownst to counsel for the defendants, one of the jurors was called to the chambers of the trial judge on December 3, 1945, and interrogated by the court in the presence of his clerk and reporter (R. 876-882).[2]

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[2] Appendix A hereto consists of the record of the interrogations. (See pp. 49 to 54 hereof.)

LAW AND ARGUMENT

Juror Latta thought a member of the State Police was in petitioner's car at the time of the occurrence involved and it would appear that she at first assumed that the officer probably reported it to the Court. It is obvious that, following his first interrogation of Mrs. Latta, the court then discussed the matter with the State Police and Special Prosecutor. Mrs. Latta thereafter was recalled for the purpose of being informed that she should not in any way blame either the State Police or the Special Prosecutor for her predicament. At the conclusion of this second interview, she stated to the court (R. 881):

> "Mrs. Latta: In my mind, I thought, *he* has told Kennedy[3] and trying to make something out of it."

It would appear that, after being assured that neither the State Police nor the Special Prosecutor had reported the incident to the court, Mrs. Latta was then disposed to blame *petitioner* for the situation that had arisen.

The rule that the trial judge shall not communicate privately with the jurors (or any of them) at any stage of a trial is well established. A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. *Hopt v. Utah*, 110 U. S. 574. Communications between trial court and jury should take place only in open court in presence of counsel for the respective parties and in the presence of defendant if he be charged with a felony, unless he voluntarily absents himself, for the jury system is founded upon the theory that a disinterested jury will hear evidence in open court and on

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[3] "Kennedy" as referred to by juror Latta was E. H. Kennedy, counsel for defendants Fleisher and Selik.

such evidence alone deliberate among themselves until the verdict is reached, and private communications although harmless in themselves may open the way to abuses and destroy confidence in legal procedure and in the judiciary. *Ray v. U. S.* 114 F. 2nd 508 cert. denied 311 U. S. 709. See also *Hinson v. State,* 133 Ark. 149, 201 S. W. 811; *Texas Midland R. Co. v. Byrd,* 102 Tex. 263, 115 S. W. 1163.

Conceding that every instance of improper communication between the trial judge and a juror would not of necessity be violative of the due process clause of the 14th Amendment, petitioner nevertheless asserts that the results of the private communication here complained of were so prejudicially harmful to him as to deprive him of a fair trial.

We complain not necessarily because the private meeting between the judge and the juror took place but because the results of that meeting, all circumstances considered, were such as to hopelessly prejudice petitioner in the estimate of the juror involved and probably in the estimation of those other jurors with whom said juror was particularly friendly.[4]

If the result of this private communication between trial court and Mrs. Latta was to prejudice petitioner in her estimation, then the impartiality of the jury was thereby destroyed and the petitioner denied the protection of the due process clause of the Fourteenth Amendment.

> "• • • Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict

[4] Another juror, a Mrs. Ganfield, rode with juror Latta to and from the trial each day and was with Mrs. Latta at the time of the occurrence in question (R. 876, 877).

the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Tumey v. Ohio,* 273 U. S. 510, 532.

"* * * If it is made to appear that a jury sworn to try a case is subjected or exposed to any matter or thing which might tend to prejudice or influence their consideration of the case, or if the behavior of any member thereof is unbecoming to a gentleman of the jury, a presumption arises against impartiality and that presumption can only be rebutted by a clear and positive showing that such matter, thing, or behavior did not influence their verdict." *Baker v. Hudspeth,* 129 F. (2d) 779, 782 (C. C. A. 10th), cert. denied 317 U. S. 681, 711, 318 U. S. 800.

The fact that this Court has not heretofore held a private communication between trial judge and juror to be violative of the due process clause of the Fourteenth Amendment is no bar to the sufficiency of our claim that such was the result in the instant case.

The judicial concept of that which may constitute a procedural violation of the due process clause of the Fourteenth Amendment it always subject to investigation in the light of the particular circumstances involved; said concept must of necessity be quick, elastic and mutable and its scope and application must be ascertained from time to time by judicial review and action. For as this Court recently held "the Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government *nor is it confined to them* * * *." " * * * The due process clause of the Fourteenth Amendment has an independent potency * * *" "A construction which shall give to due process no independent function * * *. would de-

prive the States of opportunity for reforms in legal process designed for extending the area of freedom. It would assume that no other abuses would reveal themselves in the course of time other than those which had become manifest in 1791 * * *." *Adamson v. Cal., supra* (emphasis added); *In re Oliver*, 333 U. S. 257, 280.

The hereinbelow set forth statement of Mr. Justice Roberts does, we submit, most aptly bespeak the rule here contended for by petitioner.

> "* * * in the light of the universal acceptance of this fundamental rule of fairness that the prisoner may be present throughout his trial, it is not a matter of assumption but a certainty that the Fourteenth Amendment guarantees the observance of this rule." *Snyder v. Mass.* (dissent), 291 U. S. 97, 131.

The two privately conducted interrogations of a juror by the trial court during the progress of petitioner's trial was, in view of the prejudice to petitioner flowing as a result thereof, so necessarily harmful to him as to mark his trial with an unfairness wholly violative of the due process clause of the Fourteenth Amendment.

QUESTION No. 3

SUMMARY OF ARGUMENT

The trial court coerced the jury's verdict with an unsolicited, supplemental charge which directed the jurors in the minority to conform their opinion with the majority's opinion. This was unfair and necessarily violative of the due process clause of the Fourteenth Amendment.

RELEVANT FACTS

The jury retired for deliberations sometime before lunch on December 6, 1945 (R. 1014). At about 3:00 p. m. on December 7th, while still carefully deliberating and not in any sense "deadlocked," the jury was brought back at its request for the reading of certain testimony (R. 1016). Some testimony was read to them (R. 1017-1021).

Thereafter, and sans solicitation, the court gave the jury a supplemental instruction urging it to agree on a verdict (R. 1021-1023).[5]

Immediately thereafter, the jury returned a verdict of guilty as to all defendants (R. 55, 1060). The jury was then polled individually on the question of the guilt or innocence of each defendant.

Months after the trial, one of the jurors (one Lulu Grogan) filed an affidavit (R. 1085-1087), wherein she stated in substance that this supplemental instruction was understood by her as a direction to the minority to agree with the majority, and that as a consequence, the jury thereupon ceased deliberations and she abandoned her honest opinion that the defendants were not guilty.

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[5] Appendix B hereto is the text of the supplemental charge.

LAW AND ARGUMENT

We submit that there can be no doubt but that the effect of the supplemental charge here complained of was coercive especially if consideration can properly be given to the affidavit of Juror Grogan (R. 1085-1087).*

Whereas it is the general rule that jurors may not impeach their own verdict, nevertheless this Court has held that under certain circumstances the affidavit of a juror may properly be received and considered by the court on the question of the existence of an alleged extraneous influence, if not as to how far such extraneous influence operated and affected the mind of the juror.

> "So a juror may testify in denial or explanation of acts or declarations outside the jury room. * * * it is vital * * * that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." *Mattox v. U. S.*, 146 U. S. 140; *U. S. v. Reid*, 53 U. S. 361.
>
> See also *Hyde v. U. S.*, 225 U. S. 347.

We submit therefore that this Court may properly consider the Grogan affidavit as bearing upon the existence of an extraneous influence (the unsolicited, supplemental charge in question) that may have affected this jury's verdict.

However, should the court decide that it cannot properly give consideration to the Grogan affidavit, we contend nevertheless that the supplemental charge complained of does itself bespeak a patent coercion of the jury's verdict.

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* Appendix C hereto is the affidavit of Juror Grogan.

While we find no case indicating that this Court has held that coercion of a jury's verdict resultant from an unsolicited supplemental instruction constituted violation of the due process clause of the Fourteenth Amendment nevertheless it would appear that coercion of a verdict ever has been held erroneous because it was essentially unfair. For see: *Stewart v. U. S.*, 300 Fed. 769 (C. C. A. Mo. 1924) where a jury had deliberated many hours, a supplemental instruction having been given to the effect that it would be highly desirable for the jury to reach a verdict if the jury could do so "consistently and by consultation with each other," such supplemental instruction was held erroneous as having too strong a tendency towards coercion of the minority of the jury.

Wissel v. U. S., 22 Fed. 2d 468 (C. C. A. N. Y. 1928), where the appellate court held that the trial judge may not command or coerce a verdict of guilty and that the jury must be left free to reach its own conclusions and record its conscientious convictions.

Chicago and E. I. R. Y. v. Sellars, 5 Fed. 2d 31 (C. C. A. Mo. 1925), where the court held erroneous, supplemental instructions as to the desirability of the jury agreeing upon a verdict.

The jury should be left free to act without any coercion on the part of the court, which should not unduly press the jury to agree upon a verdict. *Hyde v. Georgia*, 26 S. E. 2nd 744, 196 Ga. 475.

No judge shall attempt to coerce the jury to agree upon any particular verdict. *People v. Moore*, 25 N. Y. S. 2nd 206, 261 App. Div. 876.

Michigan followed this rule consistently up to the decision in the instant case (*People v. Fleisher*, 322 Mich. 474). For see: *People v. Kasem*, 230 Mich. 278, wherein it was

held "the rule that an instruction on the part of the court which *may* coerce the jury into agreeing upon a verdict constitutes reversible error seems well established" (emphasis added). See also *Nick v. U. S.*, 122 F. 2nd 660, cert. denied 314 U. S. 687.

The fact that the verdict was returned within a very few minutes after the jury received the supplemental instruction is, we submit, proof positive that wittingly or no the effect of this belated instruction was to coerce the jury's verdict.

It will be noted that the trial court did not consider the matter of the jury's duty to attempt to agree upon a verdict as important enough to merit mention in his original charge and the delivery of this supplemental charge at the crucial moment when given must necessarily have swept from the minds of the jury an awareness of their paramount duty to give full consideration to the vital rules of law contained in the instructions originally given and concerning burden of proof, reasonable doubt, presumption of innocence, etc. The jury must have received the erroneous impression that all that mattered was an *unanimous verdict*.

The trial court did not follow the objectionable instruction with any restatement of the essential portions of his charge as originally given.

If it be true that this supplemental charge was improper because of its coercive nature, the ultimate question "does such a coercive, supplemental charge amount to a violation of the due process clause of the Fourteenth Amendment" is presented.

The coercion of the jury's verdict here resultant from the supplemental charge was in fact a failure by the trial court to observe one of "• • • those general rules estab-

lished in our system of jurisprudence for the security of private rights." *Hagar v. Reclamation District*, 111 U. S. 708. It amounted to the conduct of a criminal trial by Michigan not in accordance with "• • • the ordinary forms of criminal prosecution in the state • • •," *Caldwell v. Texas*, 137 U. S. 697. The coercive, supplemental charge in question constituted such a failure by the trial court to conform to "• • • fundamental standards of procedure • • •" as to preempt the due process clause of the Fourteenth Amendment (*cf. the dissent of Mr. Justice Murphy in Adamson v. Cal.*, 332 U. S. 46).

The very same argument heretofore advanced in this brief at pp. 27 and 28 is by reference incorporated here in support of our claim that a coercive, supplemental charge in a criminal trial was a violation of the rights insured petitioner by the due process clause of the Fourteenth Amendment.

This argument runs—the scope of the due process clause of the Fourteenth Amendment is not rigidly limited but is, on the contrary, an elastic concept affected, to a greater or a lesser extent, by the factual situation involved. Any impropriety on the part of the state, which by its very nature and because of the prejudicial consequences thereof taints a criminal trial with essential unfairness, is violative of the due process clause of the Amendment quite irrespective of whether or not this Court has or has not heretofore catalogued the impropriety in question among those historically and traditionally conceded to be so violative of due process as to demand this Court to review and correct the judicial process of an offending state.

> "Experience has confirmed the wisdom of our predecessors in refusing to give a rigid scope to

this phrase. It expresses a demand for civilized standards of law. It is thus not a stagnant formulation of what has been achieved in the past, but a standard for judgment in the progressive evolution of the institutions of a free society." *Malinski v. N. Y.*, 324 U. S. 401, 414.

Furthermore, this Court has held "what constitutes due process of law depends on circumstances" *Moyer v. Peabody*, 212 U. S. 78, 84, presumably to be "ascertained from time to time by judicial action." *Twinning v. N. J.*, 211 U. S. 78.

QUESTION No. 4

SUMMARY OF ARGUMENT

The highly improper remarks by the prosecutor calling the jury's attention to petitioner's alleged guilty involvement in and connection with an entirely separate and distinct prosecution for conspiracy to murder but recently concluded to the accompaniment of unprecedented publicity, were so essentially unfair as to vitiate the protection of the Fourteenth Amendment to which petitioner was entitled.

RELEVANT FACTS

On direct examination by the special prosecutor, state's witness Abramowitz testified that he was a witness "in the Battle Creek case and so was Henry Luks" (R. 484).

This so-called "Battle Creek case" was the widely publicized trial in the City of Battle Creek, Calhoun County, Michigan, in July, 1945, of petitioner, Harry Fleisher, Louis Fleisher, and Myron Selik, on a charge of conspiracy to murder State Senator Warren G. Hooper. Said prosecution was initiated by warrant issued by a so-called "one man grand jury" then being conducted in

Ingham County, Michigan, by a then Circuit Judge who is now a member of the Michigan Supreme Court. Mr. Kim Sigler (elected Governor of Michigan in 1946) was Special Prosecutor for this "one man grand jury" and he prosecuted the so-called "Battle Creek case." Mr. Sigler likewise prosecuted the case at bar as a Special Prosecuting Attorney for Oakland County, and he had functioned as Special Prosecutor for the Oakland County "one man grand jury" that issued the complaint and warrant herein.

Furthermore, and most significantly, the State's principal witnesses in the "Battle Creek case" were the very pillars of the instant prosecution, i.e., Abramowitz and Luks, who, as here, were given immunity from prosecution even though both had previously been convicted of three felonies and were, as a consequence, subject to life imprisonment under Michigan habitual criminal law if again convicted of a felony. All defendants in the "Battle Creek case" were convicted, but on appeal, the Michigan Supreme Court set aside Petitioner's conviction "without a new trial" (see *People v. Fleish*, 321 Mich. 443).

After Abramowitz had testified that he was a witness "in the Battle Creek case" (R. 484) and while he was being cross-examined by counsel for the defendants Fleisher and Selik, the following occurred (R. 484-486):

"*Re-cross Examination*

By Mr. Kennedy:

Q. To get right down to it, when you were arrested back in Mason, Michigan, you were arrested and charged with the murder of Senator Hooper?

A. I was not charged with anything. All they did, they asked me did I know Harry Fleisher and Pete Mahoney and Mike Selik and Charlie Leiter and a few others.

Q. They never accused you of being implicated in the killing?

A. Never.

• • • • •

Q. Were you questioned about your presence in the City of Albion?

A. I was not.

Q. At any time?

A. No, not at that time.

Q. Well, that time. Maybe I wasn't fair when I shot at you at any time. I specifically ask you, Sam, whether or not after the 27th of March, 1945, you were told by certain police officers that a picture of yourself had been picked out by a Mrs. Iris Brown, the manager of a tavern in Albion, Michigan, and identified as looking like the man who was in her bar-room in Albion on the 11th of January, 1945?

A. That I said that?

Q. No, were you ever given that information and told that?

A. I don't recall that.

Q. You certainly would remember that.

Mr. Sigler: Now, your Honor, I move that remark be stricken from the record. If the Court please, that is a clear fabrication and imagination on the part of counsel.

The Court: I didn't get it.

Mr. Sigler: Something about a woman in this bar picking this man out as being in the bar on a certain occasion. *As a matter of fact, a Mrs. Brown picked out Pete Mahoney as being in that bar.*

Mr. Bond (trial counsel for petitioner): If the Court please—

The Court: These remarks may be stricken. That last remark of Mr. Sigler may be stricken and the jury instructed to disregard it."

LAW AND ARGUMENT

While it is true that the court instructed the jury to disregard the highly prejudicial remark of the Special Prosecutor—

> "As a matter of fact, a Mrs. Brown picked out Pete Mahoney as being in that bar" (R. 486)—

the statement was so palpably unfair to petitioner (especially so in view of the subsequent vindication of petitioner by the Michigan Supreme Court) that its very utterance in the hearing of the jury precluded the possibility of his receiving due process of law at this trial. The court's admonition to ignore the thrust could not and did not cure the fatal error. *Sunderland v. U. S.*, 19 Fed. 2nd 202, 216; *People v. Kolowich*, 262 Mich. 137.

Because of the unprecedented radio and newspaper publicity given to the Hooper case from the time of the killing (January 11, 1945) to and throughout the trial (July 16-31, 1945) of those accused of conspiracy to murder Senator Hooper, and up to and throughout the trial of the case at bar, it is inconceivable that the jurors trying petitioner were not only aware of the Hooper case but it is probably true that to a greater or lesser extent these jurors were incensed and exercised by the fact that those found guilty of conspiring to murder the senator had received relatively piddling and inadequate prison terms of from 4½ to 5 years. (See *People v. Fleish, et al.*, 321 Mich. 443).

It is therefore only reasonable to assume that the natural consequences of the gratuitous albeit highly objectionable statement of the Special Prosecutor was utterly devastating and entirely unfair in that his said statement:

(a) identified Petitioner Mahoney to the jury as one of those convicted of conspiracy to murder Senator Hooper;

(b) tended to suggest to the jury that by convicting Mahoney (whether or no he be guilty of the crime charged) it would be possible by imposition of a severe penalty (armed robbery in Michigan requires a term of imprisonment for any number of years up to and including life) to adequately punish defendant for his part in the Hooper killing; and

(c) ignored the pendency of petitioner's (successful) appeal in the said Hooper case.

It is not reasonable to assume, recognizing human nature for what it is, that the jury trying petitioner could have received this pregnantly vicious statement of the Special Prosecutor without having become irreparably biased against petitioner and that it could retain that degree of aloof impartiality universally conceded to be an indispensable prerequisite to a fair trial. *Tumey v. Ohio,* 273 U. S. 510, 532. *Cf. Ex parte Wallace,* 152 P. 2nd 1 (Cal.).

It is apparent that the statement of the Special Prosecutor was not provoked by petitioner or his counsel but was purely and simply an unethical (nonetheless highly effective) device whereby the Special Prosecutor sought to (and undoubtedly did) bolster his case against the petitioner with what the jury must surely have considered as "testimony" emanating from the then highly regarded Special Prosecutor of the fabulously publicized Ingham County "one man grand jury"; the essential unfairness whereof being exceeded only by the gross shabbiness of

the artifice utilized by the Special Prosecutor in his successful attempt to secure the conviction of petitioner.

The rule requiring scrupulous fairness on the part of the Prosecuting Attorney is well recognized and deeply rooted in our jurisprudence as a basic and fundamental requirement of due process. The prosecutor's duty is not only to use every legitimate means to bring about a just conviction, but to refrain from improper methods calculated to produce a wrongful conviction. "The prosecutor may strike hard blows but he is not at liberty to strike *foul* ones." *Berger v. U. S.* 295 U. S. 78. A prosecuting official is an officer of the court charged as much with the duty of freeing the innocent as convicting the guilty, and charged always with the duty of according a fair trial. *Mooney v. Holohan,* 294 U. S. 103; *Malinski v. New York,* 324 U. S. 401. Prosecutors must remember that the accused is entitled to a fair trial and that they are duty bound not to take advantage of their official position to deprive him of such right. *People v. Burnette,* 102 P. 2nd 799 (Cal.). It is the duty of the court and of the prosecutor to see that defendant's fate is not prejudiced or settled by any forbidden or untoward methods. *People v. Johnson,* 284 N. Y. 182, 30 N. E. 2nd 465.

The statement[7] was, of course, highly improper (apart from its essential inflammatory nature) by reason of the fact that it brought to the attention of the jury petitioner's involvement in another and entirely unrelated offense.

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[7] The record here is replete with evidence of similarly unfair and grossly improper tactics employed by the special prosecutor. See the objectionable remarks as set forth herein at p. 19 and again those at p. 44. Where the misconduct of the prosecutor is "pronounced and persistent with a probable cumulative effect upon the jury," a new trial must be awarded. *Berger v. U. S., supra.*

Prosecuting Attorneys must refrain from placing before the jury directly or indirectly any fact or circumstance which would not be regularly admissible. *Wortham v. State,* 115 S. W. 2nd 650 (Tex.).

Counsel must never endeavor wilfully, knowingly and insistently to inject into a case matters wholly illegal and inadmissible in order to fasten a conviction on a person charged with a criminal offense. *Moore v. State,* 9 S. O. 2nd 146 (Ala.).

Conceding that not every instance of this type of impropriety on the part of a prosecuting attorney would warrant this court's intervention under the due process clause of the Fourteenth Amendment, nevertheless when the end product of such impropriety is so palpably unfair as to preclude any result other than conviction, then certainly the protection of the due process clause must needs be invoked for where the conduct of a criminal trial is involved due process requires not only that justice be accomplished, but rather that the verdict, whatever it be, shall have been achieved by fair means. *Snyder v. Mass.,* 291 U. S. 97, 137.

The ultimate and controlling question is therefore: Were the consequences of this statement by the Special Prosecutor so obviously harmful to petitioner as to challenge this Court's review to determine whether his trial was so unfair as to be violative of the due process clause of the Fourteenth Amendment.

We contend that to pose the question is, in the light of the settled law and the factual situation present, to answer it in the affirmative.

Nor should the fact that this court has not heretofore found it necessary to hold that such an impropriety as is here in question was violative of the due process clause

of the Fourteenth Amendment necessarily bar the court from reviewing petitioner's trial, conviction and sentence, if, as we contend the effect of the objectionable statement by the Special Prosecutor was to preclude or to tend to preclude petitioner from receiving a fair trial.

In the interest of brevity we once again presume to refer to the court to pp. 27 and 28 of this brief for the argument that the scope of due process is not necessarily limited, prescribed and predetermined but that on the contrary it is a living, expandable concept.

The Special Prosecutor's remark here complained of constituted a violation of due process not only because the consequences whereof were so necessarily destructive of petitioner's right to a fair trial but also because it involved gross violation of the universally recognized rules of evidence prohibiting the knowing and wilful injection into the case by the Prosecutor of matters wholly illegal and inadmissible. Cf. *Tot v. U. S.*, 319 U. S. 463; *Moore v. Alabama, supra; Miller v. U. S.*, 120 Fed. 2nd 968, 973. All these decisions bespeak the law denouncing failure by the prosecution to observe fundamental and essential rules of evidence.

The flagrant breach of such rules in the instant case necessarily resulted in a trial so essentially unfair as to have offended those canons of decency required by the due process clause of the Fourteenth Amendment to have been observed by Michigan on the trial of petitioner.

QUESTION No. 5

SUMMARY OF ARGUMENT

The grossly improper statements of the Prosecutor, whereby he in effect "testified" on a material point, and whereby he sought to circumvent the operation and effect of the general rule excluding hearsay, were so essentially unfair as to deny petitioner the protection of the due process clause of the Fourteenth Amendment.

RELEVANT FACTS

The testimony showed that a car used by the bandits on the night of the robbery belonged to state's witness Eisner (R. 358, 318, 329), who testified that he owned a Tudor Pontiac Sedan that he sometimes loaned to friends (R. 319); that on December 1, 1944 he loaned said car to one Hyman Niskar (R. 320); that the car was returned to his house (R. 320) and that on the morning of December 2, 1945 while he was driving two lawyers to downtown Detroit (R. 322) one of these lawyers mentioned a large pool of blood that he saw on the floor mat in the rear section of the car. No foundation was laid for the impeachment of Eisner by the prosecution (R. 316-329) nor was his testimony impeached.

Niskar was not produced as a witness and his name was not endorsed on the information prior to the trial. Whereas during the course of the trial, it became apparent that Niskar was a vitally important, *res gestae* witness, the prosecution nevertheless refused to endorse him as such, and the trial court upheld the prosecutor's refusal.

State's witness Edward V. Johnson, a Michigan State Police Detective, testified on direct examination that he first learned about Hyman Niskar's having borrowed

Eisner's car about a month previous to the trial of this case (R. 682) and thereupon took some steps to locate him (R. 683). On cross examination, Johnson again stated unequivocally that the request to locate Niskar was made to him about one month before the trial started on October 23, 1945 (R. 683). Later Johnson hedged on this testimony and stated that he would have to consult his records to be able to give the exact date (R. 683). The next day, Johnson testified that it was after the trial started that he first learned anything about Niskar having borrowed Eisner's car on the night preceding the Pontiac robbery (R. 753). State's Witness Morse, a Michigan State Police Lieutenant, testified that he first learned about Niskar borrowing the Eisner car on either the first or second day of the trial herein (R. 907-909); that this information came from Eisner while he and Eisner were in the lobby outside the courtroom. The actual selection of the jury was not completed until November 1, 1945 (R. 149).

It is therefore apparent that the prosecutor and his staff knew that state's witness Eisner had loaned his car to Hyman Niskar (on the night preceding the robbery at Pontiac) either one month before the start of the trial or at least seven days before a jury was finally impanelled on November 1, 1945.

Defense counsel repeatedly raised the question about the necessity of endorsing and calling Niskar as a state's witness (R. 464, 509-512, 521-523, 682-684, 751-753, 807-823, 855-869, 875, 899-907, 908-929). The court having refused to require the endorsement of Niskar as a state's witness also denied defense motions for a continuance so that they might attempt to call Niskar as a witness (R. 930).

Defense witness Carl F. Wixom testified on November 30th that Niskar had been in Chicago on October 21st, October 25th, October 30th, November 3rd, November 6th, November 15th, and had made or received long distance calls on those days, some of them being traced to Chicago hotels (R. 807-821). There was no showing that Niskar would have refused to testify if he had been located, and no suitable showing that the prosecution had made efforts to contact him in Chicago, and no time was allowed the defense to do so.

On direct examination of Lieutenant Morse (and after Eisner had testified in the manner hereinbefore described) the Prosecutor asked Morse whether Eisner had not told him, prior to said conversation in the court lobby, that he loaned his automobile to one of the defendants. This question was objected to as calling for "hearsay", the court sustained the objection and thereupon the Special Prosecutor stated in the presence of the jury:

> "Prior to that day Mr. Eisner made certain claims about his automobile" (R. 917); and again
>
> "Prior to that date Mr. Martin Eisner claimed one thing—" (R. 918).

Motions for a mistrial were made and denied and the court gave no instruction to the jury to disregard the Prosecutor's prejudicial statements (R. 921, 925).

LAW AND ARGUMENT

The objectionable statements of the Special Prosecutor here complained of, following, as they did, an obviously improper question calling for an "hearsay" answer from state's witness Morse, reflected the disposition of the Special Prosecutor to prostitute his high office by seeking to "testify" himself whenever the need to reinforce

his case against petitioner should arise. The essential unfairness of such tactics was surely destructive of the fair trial guaranteed petitioner by the Fourteenth Amendment.

The asking by a Prosecutor of an improper question and the making of a prejudicial statement on a matter of vital import by a Prosecutor, as here, most certainly operated to preempt due process at this trial because of the recognized rule that a jury is generally disposed to consider the Prosecutor as an entirely unbiased seeker after the truth rather than as an irresponsible partisan concerned only with the winning of a lawsuit. *Berger v. U. S., supra.*

The Special Prosecutor was concerned at this point in the trial with attempting to gloss over an obvious weakness in his case against petitioner that developed as a result of the exposure of his refusal to produce as a state's witness one Hyman Niskar, the said Niskar apparently being possessed of knowledge that should probably have been very helpful to the jury, if not entirely conclusive on the question of guilt or innocence.[8]

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[8] If justice had been the aim of this prosecution, neither the special prosecutor nor the Court would have insisted on the case going to the jury until all reasonable efforts to produce Niskar's attendance and testimony had been exhausted.

If the stories of Luks and Abramowitz were discredited in material respect, the State's case against petitioner must of necessity collapse, for no witnesses (other than these thrice convicted felons who so readily sought to exchange petitioner's liberty for their own) implicated petitioner in the feloniously inspired ride to Pontiac taken by Abramowitz and Luks on the early morning of December 2, 1944.

After the People learned that it was the Eisner car that was used by the bandits and that Eisner claimed he had loaned it to Niskar, the duty to show the whole transaction made it incumbent on the prosecution to at least attempt to show the jury into whose possession the car had been

To surmount this difficulty the Special Prosecutor (quite oblivious of his sworn duty to be fair and to abide the rules of evidence) hit upon the device of attempting to vicariously impeach state's witness Eisner by asking state's witness Morse an obviously improper question, calling for an "hearsay" answer, calculated to convey *as fact* to the jury the *mere theory* of the prosecution that state's witness Eisner had misinformed the prosecuting authorities, that Eisner was probably lying in order to favor the defense and that the real truth was that Eisner had loaned the hold-up car to one of the defendants (as claimed but not *proven* by the state) and not to Hyman Niskar—as *was proved* by the uncontroverted testimony of state's witness Eisner.

When the Special Prosecutor was thwarted by defense counsel's timely objection in this palpably unfair and highly reprehensible attempt to circumvent the hearsay rule, he then stooped to the next most effective vehicle whereby he himself gratuitously, brazenly and with utter disregard for truth, justice and fair play, stated to the jury:

> "Prior to that day Mr. Eisner made certain claims about his automobile" (R. 917)

and later (presumably apprehensive lest he had not accomplished his improper purpose) he once again stated:

(Footnote continued)

given by Niskar. If Niskar had been called as a witness and testified that he had let Luks or Abramowitz have the Eisner car, the whole complexion of the case would have changed. The large quantity of blood noted in the Eisner car the next morning could not have been accumulated in the few seconds Abramowitz claimed to have been in it after he cut his arm (R. 405). Such a pool of blood might well have been deposited in the Eisner car if Abramowitz rode from Pontiac to Detroit in it, and, if he rode in that car, his story about Mahoney was false.

"Prior to that date Mr. Martin Eisner claimed one thing" (R. 918).

An accused has a right to trial in accordance with the rules of evidence, unhampered by circumvention thereof by statements or improper offers followed by endeavors to get excluded matters before jury. *People v. Allen*, 299 Mich. 242. Where from the record it definitely may be determined that a prosecuting official has deliberately framed a question in such a manner as to make it appear that it is a proper question, but which in truth is designed to elicit an answer which the prosecutor knows will place before the jury inadmissible evidence, the conduct of the prosecutor is so grossly improper as to require reversal. *People v. Collins*, 123 P. 2d 43 (Cal.).

Recognizing full well the general rule which prevents this court from invading the domain of the state courts in matters not usually considered as inherently germane to the question of due process (within the purview and operation of the Fourteenth Amendment) *Cf. Buchhalter v. N. Y.*, 319 U. S. 427, counsel nevertheless most strenuously contends that this particular impropriety was so grossly and wilfully indecent as to necessarily befoul petitioner's trial with an essential unfairness wholly violative of the due process requirements of the Fourteenth Amendment for "the guarantee of the Fourteenth Amendment is not that a just result shall have been obtained but that the result whatever it may be, shall be reached in a fair way." *Snyder v. Mass.*, 291 U. S. 97, 137. Surely this conduct on the part of the special prosecutor failed to observe that fundamental fairness essential to the very concept of justice held by this Court to be required of the state by the due process clause of the Fourteenth Amendment.

QUESTION No. 6

LAW AND ARGUMENT

Petitioner hereby respectfully contends that, should this Court conclude that none of the specific instances of impropriety hereinbefore particularized requires this Court to issue its writ of certiorari, nevertheless the cumulative effect of all of said improprieties was to render petitioner's trial essentially unfair and therefore directly violative of the right to due process of law guaranteed by the Fourteenth Amendment. *Cf. Berger v. U. S. supra.*

APPENDIX A

Interrogation of Juror Latta by Trial Court (R. 876-882)

(December 3, 1945, the following was taken in the office of Judge Hartrick, before Court convened, in the presence of Judge Hartrick, Mrs. Edith Latta, the Court Clerk and the Court Reporter.)

The Court: I called you, Mrs. Latta, and the reason I have the reporter here is because I am not supposed to speak to you or say anything to you during the course of this trial, unless it is a matter of record. There is nothing to be alarmed about, but some information came to me that one of the parties connected with this lawsuit may have had some contact or some experience in connection with you. Now, I don't know whether there is any truth in the matter.

Mrs. Latta: Do you want me to tell you? I have an idea —one day, my car wouldn't start—I was coming out—that was at the very beginning—my car wouldn't go and different people would give me a push, and we were just in Pontiac, Mrs. Ganfield was in the car with me and I just motioned to the car in back of me and he pushed me and when he came along, I said, "Oh, I think that is Pete Mahoney", and the State Police was in the car, the State Police was in the back seat and I imagine that is what has been referred to.

The Court: Probably that is it, but I wanted to know.

Mrs. Latta: And there wasn't anything, he didn't say anything any more than he just pushed me and he went just as quick—when I got in the lot—it was the day we went home at noon, it was even before Mrs. Renwick was off the jury, it was on a Tuesday morning, but he didn't say one word to me and I didn't even get a chance to thank

him because he went so fast and this State Police I noticed, he came up this morning and he was in the car, and I imagine Davidson must have been, I don't know, but I know there was a State Police in the car. Mike Selik and Pete Mahoney was in the front seat and when Pete Mahoney got out, that is when I saw who it was, we were getting worried because it was getting close to the time to be here and we talked about it, Mrs. Ganfield and me and we thought, well, the State Police were there—

(Questions by the Court and answers by Mrs. Latta.)

Q. Who is Mrs. Ganfield?

A. She sits in the first chair.

Q. No word was said to you?

A. No, not one word and we have often said he had a good chance if he wanted to but he was just as embarrassed as I was. You know how you will, you just motion to the car in back of you and it was just one of those things that he was back of us but at the time we talked whether we should say anything and we thought, well, there was nothing said and the State Police was in the car and we couldn't see that there was anything—

Q. You probably should have said something about it to me and then if anybody had mentioned it to me, I could have passed it along.

A. If anybody said anything, but he didn't say anything to us he just gave us a push, there was nothing—

Q. Didn't even say a word to you?

A. He didn't say anything, he just as he pushed me in, he says, "Jesus, I hope nobody sees us" that is all he said and you know we talked about if anybody spoke to us and we figured that was really nothing that amounted to anything, that it was just one of those unfortunate situations that he happened to be the fellow back of me and I had a terrible time getting home, a piece of my timer had broken,

sometimes the spark would jump over, sometimes it would go and sometimes it wouldn't.

Q. You made no comment about the matter to anyone on the jury?

A. About the pushing?

Q. Yes.

A. Well, they knew I was pushed.

Q. Did you talk about it to any of them?

A. I come up and I was all excited and I was afraid I was late. They do know on the jury I was pushed.

Q. Did you make any comment about the man in any way?

A. No, I didn't, but Mrs. Ganfield was with me too and I mentioned that he felt as bad about it as I did. Before we got the car parked, he was out of the lot and I think he felt just as bad as I did.

Q. What I am asking, if you characterized him in any way by commenting on his attitude towards you, whether it may have been favorable or unfavorable or whether you made any comment to any individual on the jury.

A. No.

Q. And he never said a word to you?

A. No. If he had said anything I would have felt I should have told but he didn't say anything and it just happened he was in the car that pushed me and that State Policeman was in the back seat, that kind of good-looking slim fellow and we said, well, he would know it was just a case of somebody getting pushed.

Q. There was nothing about the circumstance that would involve you or embarrass you or Mrs. Ganfield in any way?

A. No. It is just unfortunate that he should happen to be the fellow back of me and he never said a word, you see, either, that I felt it was necessary to say anything, just a case of a push.

Q. Of course, you realize how important this trial is both ways and we want to know, of course, that there is—

A. No, it wouldn't make any difference as far as I am concerned.

Q. I am not saying anything to you about it one way or the other, I am just reporting I had the circumstance brought to me.

A. That is the only thing that has ever been that we had come in contact with him and I figured, well, there was nothing said and that it wasn't—you know, being the State Police was in the car, I figured, you know, he could tell it was just—

Q. So long as it was brought home to me, it was my duty to tell you.

A. Well, that is what it is.

Q. So long as there isn't anything about it and you can forget the circumstance—

A. Well, there isn't. Mrs. Ganfield was in the car too.

Q. I don't want you to mention it to any other members of the jury. Let the matter drop then.

A. After that we started to park in this other parking lot because someone else said that they parked in that other lot and he parked next to them. As a matter of fact, that is the only day I parked there because he was pushing me and I suppose pushing me, he pushed me in that lot.

Q. Where does Mrs. Ganfield live?

A. On Ten Mile in Royal Oak. I pick her up every morning and sometimes Mrs. Hopper. Today we came and last Friday, but she doesn't come with me all the time.

Q. They all know about this circumstance?

A. Yes.

Q. But there hasn't been anything said about the individual, I mean by way of characterization against him or for him, because of this circumstance?

A. Absolutely not. I don't know that all of them know but I do know some of them know I got pushed that morning because I was getting awful nervous, you know, about being late, but as far as any different feeling, or anything, there was nothing.

Q. I wouldn't mention it to anybody else, but if anything does occur, even if it is the slightest things, I want you to report it.

A. I wish I had but I figured there was nothing said.

Q. Very well. That is all.

(A few minutes later, Mrs. Latta was again called into the office of Judge Hartrick, and the following occurred):

The Court: Mrs. Latta, I wanted to say one thing more to you, so as to relieve any doubts or apprehensions you may have or suspicions you may have in your mind. There was no State Policeman in this car as you mentioned. These men are at liberty on bail. There is only one man not at liberty, and that is Mr. Davidson, and your assumption that there was a State Policeman is not correct.

Another thing I want to tell you is this. The information I acquired did not come from the prosecution and did not come from the defense. No one in the case has given me the information I am giving you. It came from someone who had been sitting in the court room and I am saying that so you will know that no parties in the case have been advising or bringing this matter up, because I didn't want you, especially under the circumstances, to have any feelings that somebody in the case had been talking or had been criticizing one way or the other. One statement was that there was no one who belonged to the State Police in the car at the time and the information did not come from any member of the State Police nor from the prosecution in the case.

Mrs. Latta: I don't understand. I would have sworn and Mrs. Ganfield, too—I know it was Pete Mahoney and Mike

Selik in the front seat but I would have sworn it was a State Police in uniform in the back seat.

The Court: With that, I will let the matter drop, but I wanted you to know that and I want also, to be sure you haven't made any comment about these men one way or the other to other members of the jury and I wanted to be sure there was no feeling or situation existing on the jury that might be unfavorable to the situation or favorable to the situation.

Mrs. Latta: No, it was just one of those situations that happened.

The Court: I wanted you to know that no one in the case had anything to do with this so you would not be wondering who in the case had been squealing to the Judge.

Mrs. Latta: In my mind, I thought, he has told Kennedy and trying to make something out of it.

The Court: I want you to get that out of your mind, and I say to you now, so you will have it all clear in your mind, it came from someone sitting in the trial, rather than someone in the case. That will be all.

* * * * *

APPENDIX B

Unsolicited Supplemental Charge of the Trial Court (R. 1021-1023)

The Court: We have done the most we can to assist you in regard to your statement. If there are any others you should find necessary, you may request them the same as you have in this instance.

I think, however, in order that you may give each other respectful consideration, not implying you have not done so already, but I think I should give you at least a further instruction that may have some bearing on situations of this kind, which I have given on other occasions where jurors have difficulty in reconciling their differences as to testimony and I should do so at this time.

The Court instructs the jury that the only mode provided by our constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case should at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men and women more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be

produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the people to establish every part of it, beyond a reasonable doubt, and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted. But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal the minority ought seriously to ask themselves whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated; and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

Now, I ask you to remember the elements of the case as presented. Go over the testimony as may pertain to the various respondents in this case and try conscientiously and honestly in your own convictions and arrive at a verdict if you can conscientiously do so.

You may retire.

APPENDIX C

The Affidavit of Juror Lulu Grogan (R. 1085-1087)

State of Michigan,
County of Oakland—ss.

Mrs. Lulu Grogan of the City of Pontiac, Oakland County, Michigan, being first duly sworn, deposes and says that she is the same person as Mrs. George Grogan, and that she was one of the members of the jury sworn to hear the State of Michigan v. Harry Fleisher, Mike Selik, William Davidson, Pete Mahoney and Sam Chivas, Respondents, Calendar No. 11268, and render a verdict therein.

Deponent further says that the trial of said matter was completed on Thursday, the 6th day of December, 1945, and that the case was submitted to the jury on said date; that the members of the jury did retire and begin deliberations which actively continued into the following day, December 7th, 1945; that during the afternoon of said latter day, a number of ballots had been taken to determine the status of their deliberation and it appeared then that two members of the jury were of the opinion that the verdict should be one of not guilty for said respondents; that this deponent was one of such jurors of the minority opinion.

Deponent further says that in the discussions between the jurors concerning the guilt or innocence of such respondents, certain parts of the testimony were brought into debate, and that it was at such time the jury requested that certain parts of the testimony concerning that point be read to them; that they were returned to the courtroom and under the court's direction, the court re-

porter read to them a portion of the testimony they had requested; that immediately thereafter, the Court, Honorable George B. Hartrick, informed them that he was giving them further instruction; that he then instructed them concerning minority and majority opinions of the jurors.

Deponent further says that she is not versed in legal language or terms; that she is a housewife and not familiar with technical language; that the only construction she could and did place upon such instruction of the Court, particularly given at that time and without any request of the jury and while they were actively deliberating, was that the jurors of the minority opinion should agree with the majority, regardless of their own reasoning or opinion; that following such instruction, the jury retired again to the jury room, where she was told by the foreman and others that the Court meant she had to conform to the majority opinion; that she had personally so interpreted the court's instruction, hence she and the other juror in the minority consented to a verdict of guilty without any further discussion or completion of previous deliberations, and despite her own conviction and opinion that the respondents were not guilty as charged; that she did join in the verdict solely because she thought the Court so instructed under the circumstances, and not because she thought respondents guilty; that, as a matter of fact, she was of the honest conviction at that time and at all times, that the respondents were not guilty of the crime charged and the verdict of guilty rendered was not in accord with her personal conviction.

Deponent further says that previous to such time above described and during deliberations, one Margaret C. Norton, one of the members of the jury made certain statements to the jury, which were confirmed by the foreman,

Robert Callow, that they had been informed by the Court officer, Mr. Newton, that the Court was very provoked with the jury because they had not arrived at a verdict before then and were taking so much time in their deliberations and ought to hurry up with their verdict.

Further this deponent says not.

Lulu Grogan

Subscribed and sworn to before me, a Notary Public, this 6th day of July, A. D. 1946.

Gloria M. Amantea,
Notary Public, Oakland County, Michigan.
My commission expires 1-23-48.